No. 84-782

In The
Supreme Court of the United States
October Term, 1985

STATE OF SOUTH CAROLINA, et al.,
Petitioners,

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF

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QUESTION PRESENTED

In 1943, the Secretary of the Interior took 3,434 acres into trust for the Catawba Tribe. Sixteen years later, the Tribe and the federal government agreed to end the federal trust over this tract, but only on the condition that "nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe." Basing its action on tribal consent, Congress enacted the 1959 Catawba Division of Assets Act for the purpose of distributing the 3,434 acres. The question presented is:

Whether, in addition to distributing the 3,434 acres, Congress also intended to violate the condition upon which tribal consent was obtained and *sub silentio* extinguish or limit the Tribe's long-standing claim to its 144,000-acre 1763 Treaty lands.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTION, TREATIES AND STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES—Continued

STATEMENT OF THE CASE

I. NATURE OF THE CASE

In 1760 and 1763, the British Crown entered into treaties with the Catawba Indian Tribe under which the Tribe ceded vast portions of its aboriginal territory in return for the Crown's guarantee of protection for a 15-mile-square, 144,000-acre reservation. In 1840 the State of South Carolina, without the knowledge, consent, or participation of the United States, negotiated a "sale" of the Catawba Reservation, promising it would purchase a new reservation elsewhere for the Tribe. South Carolina took possession of the Treaty Reservation but failed to acquire a new reservation for the Tribe. In 1842, after the Tribe had wandered homeless for almost three years, the State bought back a 630-acre tract of the original Reservation as a "new" reservation for the Tribe. The State continues to this day to hold this tract in trust for the Tribe.

In 1980, after more than a century of unsuccessful efforts to resolve its claim legislatively and administratively, including 1905 and 1909 administrative petitions to the Secretary of the Interior, the Tribe filed suit seeking the return of its Treaty Reservation. The Tribe seeks a declaration that it acquired, in 1763, a protected, recognized property right through its treaties with Great Britain and that since the adoption of the United States Constitution, its reservation lands have been protected by federal law. As a result, the 1840 "treaty" between the State and the Tribe is void, and the subject lands retain to this day their status as Indian tribal lands.

The question to be determined by the Court is whether the Tribe's federal law right to possess its 1763 Treaty land was taken away *sub silentio* in 1959 when Congress acted to distribute among tribal members 3,434 acres of land that the United States and South Carolina had acquired in 1943 for the purpose of rehabilitating the Tribe.

II. THE PROCEEDINGS BELOW AND THE ISSUES FOR REVIEW

The district court postponed class certification and filing of answers in favor of first considering petitioners' motion for summary judgment based solely on the effects

of the 1959 Catawba Division of Assets Act.[1] 73 Stat. 592, 25 U.S.C. §§ 931-938 ("1959 Act"). The district court then granted summary judgment for petitioners by adopting *verbatim* their proposed findings of fact and conclusions of law.

For purposes of summary judgment, petitioners' motion necessarily assumed that, until the effective date of the 1959 Act:

(1) the Catawba Tribe possessed a vested, constitutionally-protected property right in its 144,000-acre 1763 Treaty Reservation;

(2) the 1763 Reservation was subject to the same federal constitutional, statutory, and common law protection as other federal treaty reservations; and

(3) neither the Tribe's property interest nor its federally-restricted status was validly disturbed until 1959, *i.e.*, the 1840 state treaty was void.

The only question before the Court is whether the 1959 Act implicitly extinguished, in abrogation of an express understanding with the Tribe, the federally-protected status of an additional 140,000 acres of Treaty lands over and above the 3,434 acres that it was intended to affect. The Court of Appeals held that the 1959 Act did not have this effect, finding that it dealt only with the distribution of the 3,434 acres administratively acquired 16 years earlier.

III. FACTS

A. The 1763 Treaty Of Augusta.

In 1760, the Catawba Tribe and His Majesty's Superintendent of Indian Affairs entered into the Treaty of Pine Tree Hill, whereby the Catawba Tribe ceded its remaining aboriginal territory in return for "being quietly settled in a Tract of only fifteen Miles square . . ." Lt.

[1]Petitioners uniformly refer to this 1959 Act as the "Catawba Termination Act." *See, e.g.*, Pet. Br., Table of Contents. This is petitioners' own label for the 1959 Act created for this lawsuit. Congress' title for the 1959 Act is the "Catawba Indian Tribe Division of Assets Act." 73 Stat. 592; 25 U.S.C. § 931 (1982). Its stated purpose is to "provide for the division of tribal assets of the Catawba Indian Tribe of South Carolina among the members of the Tribe . . ." *Id.* Neither the word "terminate" nor any of its variants appears in the title or text of the Catawba Act.

Governor Bull to South Carolina General Assembly, October 14, 1760, S.C. Commons House Journal, No. 33, pt. 2, 14 (R. Vol. VI, Ex. 3). In 1763, the Crown issued a proclamation forbidding the colonial governors from patenting or authorizing surveys of Indian lands and forbidding private land purchases or settlement on Indian lands (R. Vol. VI, Ex. 4). The Proclamation of 1763 was the definitive statement of British Indian policy and continued in force until the American Revolution.[2]

Shortly after issuing the 1763 Proclamation, the Crown convened a treaty conference at Augusta with the Chickasaw, Choctaw, Cherokee, Creek and Catawba Tribes. Because the terms of the 1760 Treaty of Pine Tree Hill had not been honored by the British, the Catawbas renewed their claims to a larger area. The governors told the Catawbas that "our King and Father holds out his arms to receive and protect you from all your enemies and . . . you may be assured of his confirming to you all your just claims to your Lands and Hunting Grounds pursuant to [the Treaty of Pine Tree Hill]." Colonial Records of North Carolina, Vol. 2, 198 (1890) (J.A. 30). The Governors urged the Catawbas to stand by their former agreement and promised that the Treaty obligations would be fulfilled. The Catawbas agreed, and Article IV of the Treaty of Augusta provides:

> And We the Catawba Head Men and Warriors in Confirmation of an Agreement heretofore entered into with the White People declare that we will remain satisfied with the Tract of Land of Fifteen Miles square a Survey of which by our consent and at our request has been already begun and the respective Governors and Superintendant on their Parts promise and engage that the aforesaid survey shall be compleated and that the Catawbas shall not in any respect be molested by any of the King's subjects within the said Lines but shall be indulged in the usual Manner of hunting Elsewhere.

[2]Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 548-49 (1832); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 594-98 (1823); see Clinton and Hotopp, Judicial Enforcement of the Federal Restraints on alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Me. L. Rev. 17, 22 (1979).

Id. at 201-02 (J.A. 35). Following the Treaty, the Reservation was surveyed and a fort built for the Tribe's protection.[3]

B. Attempted State Extinguishment—The 1840 "Treaty" Of Nation Ford.

During the Revolutionary War, the Catawba Tribe fought alongside the Colonists against the British. Following Independence, the United States recognized the

[3]In 1772, the Crown actively protected the Tribe's possession, opposing a plan by members of the South Carolina General Assembly to lease the Catawba Reservation to one of its own members. John Stuart, the King's Superintendent of Indian Affairs, who had negotiated the 1763 Treaty, wrote the South Carolina Governor:

> The Land now Occupied by the Catawba Indians being a parcel of Fifteen Miles Square was, as well as a very considerable Extent of Country besides possessed by them when the Subjects of England first Settled in this part of the World; At the Congress held at Augusta in 1763, by the Governors of Virginia So. & North Carolina & Georgia and the Superintendant of Indian Affairs in the Southern District. The said parcel of Land of Fifteen Miles Square, being judged by the Remains of the Said Once numerous and powerfull Nation . . . to be Sufficient for their Support & Maintenance . . . and in Consideration of their Having Voluntarily relinquished their Claims to a very extensive Territory as also of their Having been always faithfully & Cordially Attached to the British Interest, was in the most Solemn Manner reserved for their use by Treaty to the Observation of which the said Governor and Superintendant bound Themselves & their Successors.
>
> The Catawbas never have by any Treaty or Publick Act Ceded the Land so Reserved to them by said Treaty of Augusta in 1763 to His Majesty, and Such a Cession cannot be Negotiated for or accepted of, for & on Behalf of His Majesty, by any other person, than His Agent for & Superintendant of Indian Affairs without a Manifest Violation of His Majesty's Orders . . .
>
> Your Excellency & the Honorable Council, cannot in my humble Opinion with any Propriety or Shadow of Right grant or lease the Whole or any Part of the Catawba Lands for any purpose or upon any Pretence whatsoever untill they shall have been first Ceded by said Indians to the Superintendant for His Majesty, without a Violation of every Order and Instruction Relative to Indian Lands.

Great Britain, Public Records, Colonial Office, Class 5, Vol. 74, pp. 85-87 (R. Vol. VI, Ex. 7).

Catawbas' title to their 1763 Treaty lands,[4] but neither entered into new treaties or agreements with nor provided services to the Tribe for 160 years, until 1943. While the Colony, and later the State of South Carolina, initially recognized the validity of the 1763 Treaty guarantees (R. Vol VI, Ex. 8, 10, pp. 19-22), increasing pressure from settlers in the area resulted in the enactment of several State statutes in the early 1800's—all without federal approval—purporting to authorize leasing of Catawba tribal lands to non-Indians (R. Vol. VI, Ex. 10). By the 1830's, nearly all of the Catawba Treaty lands had been leased to non-Indians in violation of federal law, and the lessees began pressuring the State to extinguish the Tribe's title (R. Vol. VI, Ex. 10, 11 & 12). In 1838, South Carolina conveyed its pre-emptive rights in the Catawba lands to the non-Indian lessees (R. Vol. VI, Ex. 10, pp. 20-22). The State's initial efforts to convince the Catawbas to sell were rebuffed by the Tribe, but in 1840 the State succeeded in "negotiating" the "Treaty" of Nation Ford whereby the Tribe purportedly relinquished its 144,000-acre tract in return for South Carolina's promise to spend $5,000 to acquire new tribal land in North Carolina or some unpopulated area of South Carolina (J.A. 38).[5] The South Caro-

[4]In 1782, Congress, operating under the Articles of Confederation, recognized the Tribe's claim to occupy its Treaty Reservation, and urged South Carolina to take whatever steps it deemed necessary "for the satisfaction and security of said tribe . . ." Journals of Congress, Saturday, Nov. 2, 1782. In 1825, President James Monroe and Secretary of War John Calhoun reported to the Senate that the Catawbas were among those "tribes" which still "held" lands "within our States." American State Papers, Indian Affairs, Vol. II 541 (1834), *Plan For Removing The Several Indian Tribes West Of The Mississippi River* (Jan. 27, 1825). A War Department chart attached to the report indicates that the Catawba Tribe comprised 450 persons and claimed 144,000 acres in South Carolina. *Id.* at 545.

[5]A 1908 legal memorandum submitted to the Department of the Interior states:

> The Indians assert that this treaty was obtained by opening a barrel of whiskey, hanging tin cups around the barrel, and allowing each Indian to help himself. They are prepared to make affidavit to the fact that this is the generally accepted version and statement among all their people.

Record Group 75, National Archives Central Files 1907-1939, BIA File No. 1753-1906 (R. Vol. V at 23, n.30).

lina legislature ratified the "treaty" and in turn authorized the issuance of patents to the leaseholders who occupied the land (R. Vol. VI, Ex. 10, pp. 23-24).

The United States was not a party to and did not participate in the 1840 "treaty" (R. Vol. VI, Ex. 10).

Nor did South Carolina perform its duties under the "treaty." The State did not purchase new lands, and the Tribe wandered homeless for more than two and one-half years. In 1842, the State purchased for $2,000 a 630-acre tract located entirely within the boundaries of the 1763 Treaty lands (R. Vol. VI, Exs. 13, 14). This "new" reservation comprised less than one-half of one percent of the 1763 Treaty lands. The 630-acre tract continues to this day to be held in trust for the Tribe by the State as an Indian reservation (R. Vol. VI, Ex. 15).

C. Events Leading To The 1943 Memorandum Of Understanding.

1. Early Tribal Attempts To Regain Possession.

In the century following the "Treaty" of Nation Ford, the Catawba Tribe made numerous appeals to both the State and Federal Governments to regain possession of at least a portion of its Treaty lands. In 1905 and 1909, the Catawba Tribe petitioned the Department of the Interior to assist the Tribe to regain possession. The Tribe's petitions were based on the Nonintercourse Act but were rejected because the Catawbas were "state Indians" for whom the Department concluded the United States had no responsibility (R. Vol. VI, Exs. 18, 20). During the period 1900-1930, the Catawbas made numerous appeals to the State of South Carolina seeking citizenship and "final settlement of all their claims against the state" (R. Vol. VI, Ex. 25). Although a 1908 South Carolina Attorney General opinion concluded that the 1840 treaty was valid and that its terms had been fulfilled (R. Vol. VI, Ex. 10), the State's Governor and Legislature generally acknowledged the legitimacy of the tribal claim and a number of state investigative committees were appointed, but no action was ever taken[6] (R. Vol. VI, Exs. 19, 23, 25, 28, 30).

[6]In 1910 The Tribe was advised by a federal Indian agent that they could not even get into court for a legal hearing on their claim and that they should be content with a reasonable grant from the State Legislature (R. Vol. VI, Ex. 21, pp. 11-12, 16, 21).

2. Early Efforts To Secure Federal Assistance For The Catawbas.

Following 1930 field hearings in Rock Hill, South Carolina, by a subcommittee of the Senate Committee on Indian Affairs,[7] at which Catawba Chief Blue testified that the State had taken the Tribe's 144,000-acre Treaty Reservation and left the Tribe poverty stricken, attention again focused on securing federal assistance for the Tribe.[8] Senator Thomas of Oklahoma, a member of the Senate Subcommittee that visited the Reservation in 1930, wrote in 1932 that the "subcommittee . . . found some hundred and seventy-five remnants of this band located on a tract of practically barren rock and gradually starving to death." *Division of Tribal Assets of Catawba Indian Tribe, Hearings on H.R. 6128, Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs,* 86th Cong., 1st Sess. (unpublished) (*"Hearings"*), Insert 5 at 3 (Minutes of State and Federal Conference, Oct. 21, 1958) (R. Vol. VI, Ex. 56), *quoting* Feb. 10, 1932 letter, Senator Thomas to Commissioner Rhoads. Senator Thomas later described the Catawba Tribe as "the most pathetic and deplorable Indian Tribe that I have discovered in the United States." *Hearings on S. 2755 and S. 3654, Before Senate Comm. on Indian Affairs,* 73d Cong., 2d Sess. 263 (1934).

The State began to actively seek assistance from the federal government, both for the purposes of providing relief and securing a final settlement of the Tribe's claim arising out of the 1840 "treaty" (R. Vol. VI, Exs. 33, 34, 35, 36, 45, 46, 47, 48). In 1937 and 1939, legislation was introduced in Congress authorizing general federal super-

[7]*Survey of Condition of the Indians in the United States,* Sen. Doc. No. 92, 71st Cong., 2d Sess. 7535 (1930).

[8]In 1929, Chief Samuel Blue had written the United States Commissioner of Indian Affairs, informing him that the Chief was to appear before the State Legislature, seeking "final settlement from South Carolina on land lease, which has been standing for over 130 years," and asking how the BIA "settled" with Indians of other reservations so he would have an idea what to request (R. Vol. VI, Ex. 30).

vision of the Catawbas on the condition that the State purchase additional lands (R. Vol. VI, Exs. 32, 39).[9]

D. The 1943 Memorandum Of Understanding.

With the failure to secure legislation authorizing assumption of general federal supervision, the Catawbas' Congressman and the Interior Department began to explore administrative alternatives for establishment of a program to "rehabilitate these Indians." 90 Cong. Rec. A2091-92 (May 2, 1944) (Remarks of Rep. James P. Richards) (R. Vol. VI, Ex. 43). This effort, which began in 1940, focused on the development of a joint assistance program by the state and federal governments. The State initially conditioned its participation upon a release and quit-claim by the Tribe of its claims arising out of the 1840 treaty (R. Vol. VI, Ex. 45), but the Interior Department refused to agree to extinguishment of the tribal claim as a condition for establishing a rehabilitation program (R. Vol. VI, Exs. 47, 48, 50) (J.A. 43-44)[10]

[9]The State sought to leverage its support of the 1937 legislation into a "final settlement" of the Tribe's 1840 taking claim (R. Vol. VI, Exs. 33, 34, 35). The BIA investigated the matter, however, and prepared a report documenting the Reservation's history and the State's failure to comply with the terms of the 1840 "treaty" (R. Vol. VI, Ex. 36). Neither bill was reported out of committee, despite formal action in support of the 1939 bill by the South Carolina Legislature authorizing the State Budget Commission "to negotiate and enter into an agreement with the Federal Government having as its objective the rehabilitation of the Catawba Indians and a final settlement with them so that the State may be relieved of their support" (R. Vol. VI, Ex. 41).

[10]Early drafts of the cooperative agreement, known as the Memorandum of Understanding, had contained a provision purporting to extinguish the Tribe's reservation claim (R. Vol. VI, Ex. 49), but that provision was deleted in 1941. The Solicitor of the Department of the Interior confirmed BIA's position that the Agreement should not use "a contract under the Johnson-O'Malley Act in order to deprive the Indian tribe of claims which it might be able to enforce in the courts." Mem. Sol. Int., Jan. 13, 1942, "Re The Memorandum of Understanding, etc." *reprinted in* I *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs, 1917-1974*, 1080, 1081-82 (Gov't. Printing Office, n.d.) (*"Interior Opinions"*) (J.A. 43-

(Continued on next page)

The State agreed to participate in the rehabilitation program without the extinguishment provision and on December 14, 1943, the Secretary of the Interior approved the Memorandum of Understanding between the Tribe, the State and the Department of the Interior. It contained no language concerning extinguishment of the Tribe's claim. The Memorandum clearly defined its purpose as limited to rehabilitation of the Catawbas and securing them "equal treatment with other citizens . . ." (J.A. 45).

Pursuant to the Memorandum, the State of South Carolina acquired 3,434 acres of farm land close to the existing 630-acre state reservation at a cost of $70,000 and conveyed the lands in trust to the Secretary of the Interior. The State did not convey the 630-acre reservation to the Secretary.

E. The 1959 Catawba Division Of Assets Act.

In the 1950's, the BIA began to consider withdrawing from its obligations to provide services under the 1943 Memorandum of Understanding. The federal presence at Catawba was of fewer than 15 years duration and had been consistently minimal. *Hearings* at 87-88; *see* R. Vol. III, Exs. 11, 12, 13. Federal interest in withdrawal coincided with tribal dissatisfaction over the inability of members to secure financing for farm operations and home building and improvement. The lack of federal services, coupled with federal restrictions on the alienation of any interest in reservation lands, meant that much of the newly acquired 3,434-acre tract could not be productively used (R. Vol. VI, Exs. 54, 56; R. Vol. III, Ex. 22).

In 1956, Catawba Chief Blue publicly expressed dissatisfaction: "The agreement called for a rehabilitation program for us, but nothing has been done about it so far

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44). The Solicitor also examined the source of the Department's authority to enter into the Memorandum. Noting that the "Federal Government did not take jurisdiction over these Indians until the fiscal year 1941, when the Interior Department Appropriation Act appropriated $7,500 for the relief of the Catawba Indians," the Solicitor concluded that the special appropriation "implies the grant of such jurisdiction for the purposes for which the funds were appropriated." *Id.* at 1080-81 (J.A. 40-41).

to help the Catawbas." *Hearings* at 4-5, Insert 1 (Letter to the Editor, Rock Hill Evening Herald, May 9, 1956). Shortly thereafter, BIA officials met with the Tribe at the Reservation and discussed in detail the 1943 Memorandum of Understanding and the services provided pursuant to its terms. *Hearings* at 5 and Insert 2.

In 1957 and 1958, Congressman Robert W. Hemphill sponsored large public meetings among the BIA, the Tribe and State officials in an effort to resolve the problems raised by the Tribe. *Hearings* at 6. At the 1957 meeting, BIA Associate Commissioner H. Rex Lee explained that the BIA offered "very little in the way of services" and that the BIA's ability to provide services was limited by the Memorandum of Understanding "as there had never been any treaties or agreements prior to the Memorandum of Agreement." *Hearings,* Insert 4 at 1-3 (Minutes of Dec. 20, 1957 meeting). Nonetheless, the Associate Commissioner stated that it was "the desire of the Bureau of Indian Affairs to work with the Catawbas and continue to assist them . . . ." *Id.* at 1

At the 1958 meeting, a special BIA program officer detailed the history leading to the Memorandum of Understanding, its principal provisions, and the steps that had been taken to make it effective. *Hearings,* Insert 5 (Minutes of Oct. 21, 1958 meeting) (R. Vol. VI, Ex. 56). Associate Commissioner Lee then told the Tribe "[y]our main problem is inadequate housing—the main reason being, it is impossible to borrow money. The land status has been deterior [sic] to the Indians because of the restricted status of land . . . ." Lee suggested to the Tribe that federal funds were not the answer to the Catawbas' problems, but rather the solution lay in each family acquiring title to its lands. *Hearings,* Insert 5 at 7 (R. Vol. VI, Ex. 56). Lee stated that the "[m]echanics to get lands back into the hands of the Indians" would be to reach agreement among the Indians and then approach Congress to "get the necessary legislation." Lee further told the Tribe that he knew "that you do not want to see the Tribe broken up. You might try some possible fee-simple agreements which

would be entirely feasible, but must have some help from the Congress." *Id.*

Following the October 21, 1958 meeting, the BIA Program Officer met with numerous tribal leaders in their homes "to acquaint them further with possible solutions to their problems as well as the procedure necessary to carry them out." Jan. 30, 1959, Program Officer to Chief, Branch of Tribal Programs, at 2 (R. Vol. VI, Ex. 53). The program officer's report shows that a number of tribal officials expressed concern about the status of the Tribe's claim against the State, but were assured by the program officer that the Tribe's claims would be unaffected by the BIA's proposal to distribute tribal assets.

> Had a long talk with Willie Sanders again after he had time to read my report. First, he talked about a settlement with the State before anything else could take place, but I told him that any claim the Catawbas had against the State would not be jeopardized by carrying out a program with the Federal Government [for the distribution of assets] . . . .

(R. Vol. VI, Ex. 53 at 7; *see also* pp. 8-9, 14, 16-17).

At a January 3, 1959 tribal meeting, the Catawba Tribe agreed to the federal withdrawal program and adopted a tribal resolution drafted for the Tribe by the BIA. *Hearings* at 8. The tribal resolution requested the removal of federal restrictions on the Tribe's "3,388.8 acre reservation in York County." *Hearings,* Insert 6 (J.A. 102).[11] The tribal resolution was based solely upon the inability of members to "obtain credit to build homes . . . or to improve or develop the property." *Id.* The resolution specifically conditioned tribal support of division of assets legislation on preserving intact the Tribe's longstanding Treaty claim: *"and that nothing in this legislation shall*

[11] In 1957, Congress authorized the transfer of "approximately forty-nine" acres of the land acquired pursuant to the 1943 Memorandum of Understanding to the City of Rock Hill. Act of May 17, 1957, 71 Stat. 31. To avoid confusion, we refer to the lands distributed pursuant to the 1959 Act as "3,434 acres," although in fact only 3,383.8 acres were affected by the Act.

affect the status of any claim against the State of South Carolina by the Catawba Tribe." Id. (emphasis added) (J.A. 103).[12]

On January 26, 1959, Congressman Hemphill requested BIA Associate Commissioner Lee to draft legislation "to accomplish the desires [of the tribe] set forth in the Resolution. I believe it will be of great benefit to the Tribe, both individually and collectively . . . ." (J.A. 50).

On March 28, 1959, the Congressman presented the BIA's draft bill to the Tribe, reading it to the members "line by line". *Hearings* at 9. According to the BIA's minutes of the meeting, the Congressman also read the tribal resolution and told the Tribe that he had had the "legislation drawn up to carry out the intent of the resolution." (J.A. 111). Congressman Hemphill stated that Associate Commissioner Lee had told him on his first trip to Washington that BIA services under the Memorandum of Understanding could not be expanded and that, "in his [Hemphill's] opinion, the [1943] memorandum of understanding had been of no advantage to the Tribe." (J.A. 112). Congressman Hemphill assured the Tribe that no legislation would be introduced without the Tribe's approval. *Id.* Referring to the draft bill as a "contract that was drawn up by the [BIA]" (J.A. 106, 107), the Tribe then approved the introduction of the bill by a vote of 40 to 17 and it was introduced on April 7, 1959.

The Congressman's introductory remarks note that the Tribe "just voted a resolution to have me introduce a bill" and cite the Tribe's need to have title to its "4,000 acres" so that members might no longer be excluded from "the privileges of development." 105 Cong. Rec. 5462 (April 7, 1959) (J.A. 116).

Congressman Hemphill's testimony before the House Interior Subcommittee described the problem to be remedied by his bill solely in terms of tribal members' inability

[12]Petitioners incorrectly assert that the Tribe's January 3, 1959 resolution was not "before Congress" (Pet. Br. at 40, n. 116). The resolution is a part of the July 10, 1959 hearing record, however, having been introduced by the bill's sponsor. *Hearings* at 8, 13

to "borrow any money on community property" as a result of an agreement "in 1944 [sic] which was . . . worthless . . . ." *Hearings* at 7. The Congressman assured the subcommittee that his bill was based upon the Tribe's consent as expressed in the January 3, 1959 tribal resolution:

> I refused to introduce a bill until the Catawba Indian Tribe requested it. On January 3, 1959, the Catawba Tribe passed the following resolution—I ask permission to insert that resolution at this point as a part of the record.
>
> As a result of that resolution, I asked the Bureau of Indian Affairs to assist me in the preparation of a bill, and I introduced the bill which is before you today.

Hearings at 8. Associate Commissioner Lee's testimony before the Interior subcommittee confirmed to Congress that the legislation had been drafted to conform to the wishes of the Tribe:

> After this meeting they petitioned their Congressman to introduce a bill. The Congressman asked us for drafting service, and we drafted a bill along the lines that we thought the Indians had been discussing.
>
> After the bill had been drafted, however, we advised Congressman Hemphill that before we could report favorably on the bill we thought a specific bill should be presented to the Indians and explained to them in detail so we could be sure this was the type of program they wanted. This was done at the March 28 meeting . . . .

Hearings at 84.

The reports of the House and Senate Committees are virtually identical, stating that the Act's purpose is to "provide for the division of the tribal assets of the . . . Tribe . . . among the . . . members . . ." (J.A. 120). "The assets consist principally of the tribal land which comprises nearly 4,000 acres . . ." (J.A. 121). The committee reports, like the Act itself, make no mention of the 1763 Treaty claim sought to be preserved by the Tribe. The reports do show that Congress was basing its action on the Tribe's consent as expressed in its meetings of January 3 and March 28, 1959:

> The Catawba General Council at a regular meeting on January 3, 1959, asked that Federal restrictions be removed from their lands and that deeds thereto be issued. On March 28, 1959, the general council met in special session and endorsed the terms of this bill, as introduced, by a vote of 40 to 17.

H. R. Rep. No. 910, 86th Cong., 1st Sess. 2, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2671, 2672 (J.A. 121).[13]

Both the House and Senate Reports portray the subject matter of the 1959 Act exclusively in terms of duties undertaken and assets acquired pursuant to the 1943 Memorandum of Understanding:

> Efforts were made to bring the Catawba Indians under Federal jurisdiction during the 1930's when their plight was especially aggravated by the general depression. These efforts culminated in a memorandum of understanding approved on December 14, 1943, in which the Indians, the State, and the Bureau of Indian Affairs each agreed to take certain actions to alleviate the Catawbas' depressed economic condition. The agreement did not specify that the Federal Government was assuming guardianship of these Indians, and neither the Indians nor the State ever claimed that the Catawbas were wards of the Federal Government.
>
> In accordance with the memorandum of understanding the State bought 3,434.3 acres of land for the Catawbas and by warranty deed dated October 5, 1945, the State conveyed the land to the United States in trust for the Tribe. *It is this land and the accumulated assets from operating it that would be conveyed under the provisions of the bill.*

H.R. Rep. No. 910, *supra* at 2673 (emphasis added) (J.A. 123-124).

[13]The efforts of the BIA and Congress to ensure tribal agreement to the division of assets were in accord with the newly revised congressional policy regarding termination of Indian tribes. In 1958, Congress and the Eisenhower Administration rejected coercive termination in favor of a policy that permitted termination based only on informed tribal consent. See F. Cohen, *Handbook of Federal Indian Law* 182 (1982 ed.), discussed *infra* at 35.

The Catawba Division of Assets Act was signed into law on September 21, 1959. Following distribution by the Secretary of the Interior of only the assets acquired in 1943, the Secretary formally notified South Carolina Governor Hollings and Catawba Chief Sanders that the Department had carried out the mandate of the 1959 Act: the notice spoke exclusively in terms of withdrawing from the 1943 Memorandum of Understanding (J.A. 141).

Thereafter, the Catawba Tribe continued to reside on the small 630-acre state reservation. In 1971, the South Carolina Legislature enacted legislation exempting reservation mobile homes from state taxation and in 1975, the South Carolina Attorney General issued a formal opinion that the State continued to hold the 630-acre "old reservation" in trust for the Tribe. Op. Atty. Gen. S.C. No. 3988, March 6, 1975 (R. Vol. VI, Ex. 15).

SUMMARY OF ARGUMENT

In 1840, the State of South Carolina, in the last of a series of illegal land transactions spanning more than 30 years, convinced the Catawba Tribe to "sell" its 144,000-acre 1763 Treaty Reservation. The State promised to purchase for the Tribe a new reservation elsewhere, but did not, acquiring instead a 630-acre farm that had been part of the 1763 Treaty Reservation. During the century that followed, successive generations of tribal leaders attempted to regain the land, and successive generations of state and federal officials turned their backs, each telling the Tribe that responsibility rested with the other.

In the 1930's, the State and the Department of the Interior began negotiations toward reaching a cooperative agreement for the purpose of rehabilitating the Catawba Tribe. At that time, the State attempted to secure an extinguishment of the 1840 tribal claim as a condition to participating in the rehabilitation program, but the Tribe and the Department refused and the three-party cooperative agreement was executed in 1943. Under its terms, the Secretary took into trust 3,434 acres, located within the 1763 Treaty boundaries, and agreed to provide limited services to assist the State in the relief effort.

Fifteen years later, with the relief program failing due to lack of federal assistance and tribal dissatisfaction high, the BIA and the local Congressman proposed to the Tribe that the 3,434 acres be distributed among tribal members. Tribal leaders initially refused, saying that the 1840 dispossession claim against the State would have to be resolved first. But the BIA assured them that the division of assets plan would not affect the claim. On January 3, 1959, a majority of the Tribe, which at no time during this period was represented by counsel, consented to the division plan and adopted a resolution, drafted by the BIA, that specifically conditioned tribal consent on leaving the "status of any claim" against the State unaffected. The Congressman then asked the BIA to draft a bill that carried out the resolution. The BIA complied and the Congressman then returned to the Tribe, read the bill line-by-line, and assured them it carried out the intent of their resolution. Based on these assurances, the Tribe approved introduction of the bill. Throughout the entire legislative process, Congress professed to be acting in reliance on and consistently with tribal consent.

This understanding between the Tribe, the Congressman, and the BIA is at the heart of this case. Tribal consent to the legislation was required by congressional and administrative policy. Therefore, absent a clear expression of Congressional intent to override, the Act must be read consistently with the assurances and conditions upon which that consent was obtained.

Petitioners rely on the failure of the 1959 Catawba Division of Assets Act to mention the tribal claim and a section of the Act containing language designed only to end active federal supervision. In complete disregard of the legislative history, petitioners would have the Court focus only on isolated statutory language and rule that Congress, without mention, breached the understanding with the Tribe and removed all federal protections from the 1763 Treaty lands that had admittedly (for summary judgment purposes) applied until 1959.

But Congress does not deal in so cavalier a fashion with important Indian treaty rights. In view of the strong

congressional policy against application of state statutes of limitations to Indian treaty lands, *County of Oneida v. Oneida Indian Nation,* 105 S.Ct. 1245, 1255 (1985), if Congress had intended to apply a limitations period, it would have provided that the claim would be deemed to have accrued on the Act's effective date as it did in 1966 when it enacted 28 U.S.C. § 2415. At the very least, some notice would have been provided to the Tribe that the "status" of the claim would, after all, be affected; that the earlier assurances were no longer in effect; and that the Tribe would have to file its claim within a period of years or lose it forever.

The legislative history and surrounding circumstances of the 1959 Act show clearly that Congress intended only to withdraw from the 1943 cooperative agreement and distribute only the 3,434 acres acquired pursuant to its terms. To that end, the 1959 Act removed federal restrictions only from the 3,434 acres, and the Secretary in fact distributed only the 3,434 acres. The relationship undertaken by the federal government in 1943 was not a general assumption of guardianship supervision; it was demonstrably limited to relief and rehabilitation of the Tribe and found its source exclusively in a limited 1940 congressional appropriation for that purpose. The federal protections at issue here are unrelated to and pre-date the federal relief project by more than 100 years, finding their source in treaty, the Constitution and federal statutory and common law.

In similar circumstances, this Court held that treaty rights not otherwise clearly included within the scope of a termination act would not be abrogated by the language relied on by petitioners here. *Menominee Tribe v. United States,* 391 U.S. 404 (1968). Such language, the Court held, was limited to the withdrawal of federal supervision. Because that language, contained in this case in 25 U.S.C. § 935, does not purport to identify the property from which supervision is withdrawn, its blanket application to tribal property would result in the indirect abrogation of rights not mentioned in the act and intended by Congress to be left outside the scope of the Act's coverage. The Court

thus looked to the "overall legislative plan" and found no clear intent to abrogate or modify treaty rights. The mere lifting of federal supervision was not sufficient to extinguish treaty rights not otherwise mentioned.

The *Menominee* analysis is fully applicable here. What the Catawba Tribe bargained for and received from the Crown in 1763 was not a tract of land—they already possessed the land. Rather, what the Tribe received in exchange for its vast aboriginal territory was the promise of sovereign protection. The United States assumed the Crown's obligations and thus the removal of federal protection from and application of state law to the 1763 Treaty lands would extinguish the fundamental incident of Catawba Treaty title—federal protection. That, in turn, would lead directly to extinguishment of the possessory interest, thereby defeating the very purpose of the Treaty.

Construction of the 1959 Act in accord with the understanding between the Tribe and the federal government to leave the status of the claim unaffected means only that the Tribe will have its long-awaited day in court. The end result of the 16-year federal effort to rehabilitate the Catawba Tribe should not be extinguishment of the historic claim that the Tribe persistently sought to protect, both when it agreed to accept federal relief and when it agreed to its discontinuance.

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ARGUMENT

I. THE 1959 ACT HONORED THE BIA'S AGREEMENT WITH THE TRIBE AND DID NOT EXTINGUISH OR LIMIT THE TRIBE'S 1763 TREATY CLAIM.

For purposes of summary judgment, petitioners' motion necessarily assumed that the 1840 state "treaty" was void under federal law and that the Tribe retained a right to possession of its 1763 Treaty lands until 1959. Petitioners' motion also assumed that the federally-protected status of the 144,000-acre Treaty tract was not validly disturbed until 1959. Thus, whether it is claimed that the 1959 Act applied state statutes of limitations or that the Act terminated any and all trust relationships between the Tribe and the United States, the underlying issue is

the same: did the 1959 Act extinguish *sub silentio* the federally-protected status of the 1763 Treaty lands in addition to the 3,434 acres acquired in 1943. These questions should be resolved in light of the fundamental principles recently affirmed in *County of Oneida v. Oneida Indian Nation,* 105 S.Ct. 1245 (1985) (*Oneida II*): time-related state law defenses will not be applied to determine rights in tribal lands and Congressional intent to extinguish Indian title must be plain and unambiguous.

A. The 1959 Act Removed Federal Restrictions Only From The 3,434 Acres Acquired In 1943—Congress Took No Action With Respect To The 1763 Treaty Claim.

The 1959 Division of Assets Act deals with only two classes of assets, *i.e.,* "the tribe's assets that are held in trust by the United States," 25 U.S.C. § 932, and those "assets that are held by the State in trust for the Tribe." 25 U.S.C. § 933(a). In 1959, although the Tribe's 1763 Treaty lands were still subject to federal protection, the technical fee title to the Treaty lands was not actually held by either the federal government or the State of South Carolina.[14] Hence, the 1959 Act directed or permitted distribution of tribal assets that did not include the 1763 Treaty claim. To enable the distribution, § 4 of the Act removes federal restrictions from only the lands "disposed of" under the provisions of § 3 and provides for the issuance of "unrestricted title" to only the "property conveyed." 25 U.S.C. §§ 933, 934. Therefore, the Act by its terms removed federal restrictions from only the 1943 Reservation.

This legislative scheme is confirmed by the committee reports on the 1959 Act, as well as the actions taken by Interior to implement it. The reports demonstrate conclu-

[14]While fee title, or the pre-emptive right to purchase from the Indians, became vested in the State of South Carolina upon this Nation's independence, Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667, 670 (1974) (*Oneida I*); *see* Clinton and Hotopp, *supra,* 31 Me. L. Rev. at 36, South Carolina in 1838 conveyed its pre-emptive rights in the 1763 Treaty Reservation to the non-Indian lessees who occupied the Catawba Reservation at that time. Act of Dec. 19, 1838, S.C. Code of Laws, § 27-15-30 (1976), VI Stat. 602; *see* Op. Atty. Gen. S.C., Jan. 27, 1908, 20-21 (R. Vol. VI, Ex. 10).

sively that the Tribe, the Interior Department and Congress were concerned only with the reservation acquired in 1943, and to a lesser degree the 630 acres acquired in 1842:

> The assets consist principally of the tribal land which comprises nearly 4,000 acres, including 630 held in trust by the State of South Carolina.

H.R. Rep. No. 910, *supra* at 2672 (J.A. 121).

> In accordance with the memorandum of understanding, the State bought 3,434.3 acres of land for the Catawbas and [in] . . . 1945 . . . conveyed the land to the United States in trust for the Tribe. *It is this land and the accumulated assets from operating it that will be conveyed under the provisions of the bill.*

Id. at 2673 (emphasis added) (J.A. 124).

The Report also states that the 3,388.8 acres held in trust by the United States and the 630-acre state reservation "comprise the tribe's total real property." *Id.* at 2674 (J.A. 124).

Following passage of the 1959 Act, the Department of the Interior acted consistently with the condition upon which tribal consent had been obtained and distributed only the federally-held trust lands acquired in 1943, Letter of March 29, 1966, Commissioner of Indian Affairs to Dir., S.C. Archives (R. Vol. III, Ex. 37). The Department took no action to quiet title to the Treaty lands in the Tribe or to otherwise distribute or affect the Tribe's 1763 Treaty claim, confirming that the Department did not interpret the 1959 Act to include the claim among the tribal assets subject to the Act.[15]

Petitioners, however, find Congressional intent to extinguish federal protection of the additional 140,000 acres of the 1763 Treaty tract in the language of § 5, relying on that section's general application of state law and termination of the Catawbas' limited eligibility for federal In-

[15]The statutory interpretation of the agency to which the administration of the statute is charged is entitled to deference, Udall v. Tallman, 380 U.S. 1, 16 (1965), particularly where the agency participated in drafting the statute and directly made known its views to Congress, as Interior did here. Zuber v. Allen, 396 U.S. 168, 192 (1969).

dian services. This Court has held that language very similar to § 5 of the Catawba Act is limited by its terms to the "termination of Federal *supervision* over the property and members of the Tribe." *Menominee Tribe v. United States,* 391 U.S. 404, 412 (1968) (emphasis in original).[16] Section 5 by its terms does not remove federal restrictions from tribal property, nor does it define the property which will no longer be subject to federal supervision upon the lifting of federal restrictions. Therefore, the applicability of § 5 with respect to restricted tribal property must be determined with reference to the other sections that do in fact identify the property that is the subject of the Act, §§ 2, 3, and which accomplish the actual removal of federal restrictions, § 4.

The all-encompassing application of § 5 advocated by petitioners would result in the extinguishment of rights intended to be left outside the Act's scope. That is precisely the result which the Court in *Menominee* refused to reach: treaty-secured rights to tribal property that is not clearly included with a termination act's coverage will not be backhandedly affected by the general lifting of federal supervision. Moreover, this Court has repeatedly held that congressional intent to impair Indian rights "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz v. Arnett,* 412 U.S. 481, 505 (1973); *Bryan v. Itasca County,* 426 U.S. 373, 392-93 (1976).

Congress simply did not deal with the 144,000-acre Treaty claim in any manner in 1959. As the parties to the

[16]In *Menominee,* the Court considered whether a provision in the Menominee Termination Act, 25 U.S.C. §§ 891-902, that was similar to § 5 of the Catawba Division of Assets Act, had the effect of subjecting that Tribe's Treaty right to hunt and fish to the laws of Wisconsin. The Menominee Act made no mention of either preserving or extinguishing the right, but did contain the provision that all federal Indian statutes would no longer be applicable and "the laws of the several states shall apply to the tribe and its members in the same manner as they apply to other citizens. . . ." 25 U.S.C. § 899. The Court examined the "overall legislative plan" and found that § 899 was limited to withdrawal of federal supervision: Congress had not intended to backhandedly extinguish the Treaty right through the general lifting of federal supervision.

Memorandum of Understanding had done in 1943, Congress left the Treaty claim entirely outside the scope of the Act. Petitioners' argument that Congress, by ending the Tribe's limited eligibility for federal services and the BIA's supervisory duties for the 3,434-acre 1943 Reservation, also *sub silentio* extinguished or limited the 1763 Treaty claim in violation of the express understanding reached between the Tribe and the federal government is untenable.

B. The Legislative History And Circumstances Surrounding The 1959 Act Demonstrate That Congress Did Not Intend To Affect In Any Manner The Tribe's Treaty Claim.

The Court of Appeals correctly held that the legislative history of the 1959 Act demonstrates congressional intent not to affect the Treaty claim. Rather, the Act and its history show an intent "only to end federal supervision and authority arising out of the 1943 Memorandum of Understanding." (Pet. App. 15a-16a). While the Act itself does not mention the Tribe's 1763 Treaty land, its legislative history reveals that Congress intentionally left the Tribe's Treaty claim unaffected.[17]

Petitioners and the United States, however, would dismiss entirely the relevant legislative history that shows so clearly what Congress intended to accomplish in 1959. They argue that the 1959 Act unequivocally makes state law applicable to the Tribe's 1763 Treaty claim and would have the Court look no further than the words of § 5 for its result. The first major difficulty with this approach to construction of the 1959 Act is that it ignores the limited construction already given very similar language by this Court in *Menominee Tribe, supra.* An equally serious difficulty lies in the complete failure to account for the understanding reached between the United States and the Tribe, *i.e.*, tribal consent to the division of federal assets

[17]This Court has stated that whenever it is asserted that an Act of Congress affected the status of an Indian reservation, a court must "in all cases" consider "the face of the Act, the surrounding circumstances, and the legislative history" to determine the Congressional intent. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 587 (1977); Mattz v. Arnett, 412 U.S. 481, 505 (1973); DeCoteau v. District County Court, 420 U.S. 425 (1975) *See Solem v. Bartlett,* 104 S.Ct. 1161 (1984).

was expressly conditioned upon nothing in the act affecting the "status of any claim" arising out of the 1840 dispossession. *Hearings,* Insert 6. Moreover, petitioners' approach fails to account for Congress' exclusive focus in 1959 on the 1943 Memorandum of Understanding.[18]

The Court should not construe the provisions of § 5 in isolation from the remainder of the Act and its history, but should consider § 5 with Congress' overall purpose in mind:

> In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute . . . .
>
> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole," this Court has followed that purpose, rather than the literal words.

[18]In its analysis of whether the 1959 Act ratified the 1840 "treaty," the United States concedes that (1) the Act should be construed in light of the January 3, 1959 tribal resolution; (2) the "Catawba Act was drafted to carry out the intent of the resolution," U.S. Br. at 8, n. 7; and (3) "Congress's focus in this case [was] on the 1943 Memorandum of Understanding." *Id.* at 15. But in its analysis of the applicability of state law to the 1763 Treaty claim, the United States does an about-face and accords absolutely no significance to the tribal resolution, or other legislative history, arguing instead that only the language of § 5 should be considered. *Id.* However, all sections of the Act must be construed in light of the conditions and assurances upon which tribal consent was obtained.

United States v. American Trucking Ass'n., 310 U.S. 534, 542-3 (1940) (footnotes omitted); *Chemehuevi Tribe of Indians v. Federal Power Commission*, 420 U.S. 395 (1975). Petitioners' and the United States' reliance on only the language of § 5 in isolation from the rest of the Act and its history is misplaced, for even if the provisions of § 5 were clear, which they are not, their application here would lead to a result that is "plainly at variance" with the overall purpose of the legislation. *Id.*

1. Congress Intended The 1959 Act To Implement The Division Of Assets Plan Agreed To By The Tribe, Their Congressman And The BIA: Congress Understood That Plan To Be Embodied In The January 3, 1959 Tribal Resolution.

In 1958, the BIA's special program officer met with tribal leaders and assured them that the Tribe's 1763 Treaty claim would be unaffected by the proposed legislation to divide the federal assets (R. Vol. VI, Ex. 53). The tribal resolution endorsing the division of assets legislation was drafted by the BIA (the Tribe was not represented by counsel), and specifically conditioned tribal consent on the Tribe's understanding "that nothing in this legislation shall affect the status of any claim against the State . . . by the . . . Tribe." *Hearings*, Insert 6 (J.A. 103). Thereafter, Congressman Hemphill requested the BIA to draft a bill to accomplish the desires of the Tribe as set forth in the tribal resolution (J.A. 50). The BIA complied. *Hearings* at 84.

The Congressman then returned to the Tribe on March 28, 1959, read line-by-line the BIA's draft bill containing § 5 as enacted, *Hearings* at 9, and assured the Tribe that the bill had been drafted to carry out the intent of the January 3, 1959 resolution (J.A. 111). Referring to the bill as a "contract that was drawn up by the [BIA]" (J.A. 106, 107), the Tribe then approved the bill and the Congressman introduced it, emphasizing to his colleagues that the Tribe had enacted a resolution supporting it. 105 Cong. Rec. 5462 (April 7, 1959) (J.A. 117).

At the congressional subcommittee hearing, the Congressman emphasized "the deplorable situation of the Indians" and the Tribe's dissatisfaction with the 1943 Memorandum of Understanding. *Hearings* at 4-5. The Congressman testified that his bill was "to do something about" the problems resulting from the "worthless" 1943 agreement that resulted in the Indians' inability to "borrow any money on community property [or] . . . develop the reservation." *Hearings* at 7. The Congressman told the subcommittee that he had refused to introduce this bill until the Tribe requested it and then introduced the tribal resolution into the record to establish tribal agreement. *Hearings* at 8, 13. He emphasized throughout his testimony that the Tribe had consented to the bill. Summarizing the situation, the Congressman testified:

> We are frankly, faced with this alternative: *Do what the Indians want*, or leave the situation in its present status which bars many who want to own their lands, their homes, from expecting progress in the future.

Hearings at 11 (emphasis added). The congressional committee reports on H.R. 6128 show that Congress relied specifically on the January 3 and March 28 endorsements by the Tribe. H.R. Rep. No. 910, *supra* at 2672, 2675 (J.A. 121, 126).

This legislative history demonstrates that Congress honored the agreement with the Tribe and left the tribal claim unaffected. Neither the Act itself nor the Committee Reports contain even a suggestion that Congress intended to alter the status of the Tribe's understanding with the BIA in any way.[19] The 1959 hearing record contains the January 3 tribal resolution, as well as an October

[19] Petitioners urge the Court to disregard tribal consent as expressed in the January 3, 1959 resolution, arguing that a more relevant indicator of what the Tribe agreed to is the post-Act "vote" of the Tribe (Pet. Br. at 45, n. 133). Interior's post-Act explanation, however, contained nothing to indicate that the prior assurances were no longer in effect—§ 5 had not been amended from the time that BIA and the Congressman read it line-by-line and assured the Tribe that the Act carried out the resolution's intent. Moreover, as Assistant Commissioner Lee testified, *Hearings* at 86-87, the purpose of the amendment to § 1 requiring a plebiscite was merely confirmatory of the earlier understanding, *i.e.*, "to dispell all doubt" that the earlier meetings (January 3 and March 28) were "indicative that the large majority . . . actually want this type of legislation." Lee told the subcommittee that the BIA was "reasonably sure" they were. *Id.*

29, 1958 letter from Chief Blue claiming that the state "owes us a great deal" for the "land under lease,"—described as the area presently claimed by the Tribe. *Hearings,* unnumbered insert. Congress was thus certainly aware that the Catawba Tribe possessed a claim that it desired to protect, that the Tribe had expressly conditioned its consent to division of the 3,434 acres on leaving the status of the claim unaffected, and that the bill had been drafted to conform to tribal desires. At every stage of the legislative process, from agency drafting to final enactment, it was emphasized that the Tribe had consented to the provisions of the bill.

2. Because Tribal Consent Was Required By Congressional And Administrative Policy, The 1959 Act Must Be Construed Consistently With The Conditions Upon Which Tribal Consent Was Obtained.

The congressional and departmental concern for tribal consent conformed to an important recent revision in federal termination policy that occurred in 1958. In that year, Congress and the Eisenhower Administration rejected the coercive termination policy that underlay the first nine termination acts enacted in 1954 and 1956. F. Cohen, *Handbook of Federal Indian Law* 182 (1982 ed.). The revised policy placed special emphasis on both the Indians' understanding and consenting to termination. On September 18, 1958, Secretary of the Interior Fred Seaton publicly renounced coercive termination. Seaton stated that no Indian tribe or group should be terminated:

> unless such tribe or group has clearly demonstrated-first, that it understands the plan under which such a program would go forward, and second, that the tribe or group affected concurs in and supports the plan proposed . . .

Id., Broadcast address over Radio Station KCLS, Flagstaff, Ariz., *quoted in* 105 Cong. Rec. 3105 (1959). Thus, unlike earlier termination acts, Congress expressly conditioned implementation of post-1958 acts on the consent of the affected Indians or tribes. *See* 72 Stat. 619, § 2(b) (California Rancheria, 1958); 25 U.S.C. § 931 (Catawba, 1959); 25 U.S.C. § 971 (Ponca, 1962).

If Congress had intended to repudiate the conditions and assurances upon which the Tribe's consent was obtained, then it certainly would have notified the Tribe to that effect. Petitioners' interpretation of the legislative history, in particular their reliance on general statements and explanations made to the Tribe regarding ending federal responsibility and the inapplicability of federal Indian laws, *see, e.g.,* Pet. Br. at 17, would require the Tribe —which at no time during the legislative process was represented by counsel (other than the BIA)—to simply discover at some later date that the prior guarantees were no longer in effect.

But Congress certainly could not have expected the Catawba Tribe in 1959 to understand the intricacies of the applicability of time-related state law defenses or whether its claim was in fact founded in state or federal law. Chief Samuel Blue, who led his Tribe for most of the 40-year period preceding the 1959 Act, *see* 105 Cong. Rec. 5462 (April 7, 1959) (J.A. 116), had never attended school and was unable to read or write. *Survey of Condition of the Indians, etc.,* S. Doc. No. 92, *supra* at 7552. The Tribe simply understood that the State had taken its 1763 Treaty lands and had not honored its agreement to buy new tribal lands—leaving the Tribe destitute on a barren tract comprising less than one percent of its former holdings. As best it could, the Tribe sought to ensure that the Division of Assets Act would not "affect the *status* of *any* claim against the State of South Carolina"—whatever that claim might be—and the United States agreed.[20] Indeed, the Tribe viewed the bill presented by Congressman Hemphill as a "contract" (J.A. 106). If Congress had intended to change the terms of that agreement and apply state stat-

[20]Petitioners argue that the Tribe sought only to preserve a "claim against the State," as distinguished from the other public and private defendants (Pet. Br. at 46, n. 135). However, the history of events leading to the 1943 Memorandum of Understanding demonstrate that this was simply the common manner of referring to the claim arising out of the 1840 dispossession. *See, e.g.,* R. Vol. VI, Ex. 47. The Tribe, South Carolina, and the United States *all* knew that the 1763 Treaty claim had been persistently pursued by successive generations of tribal leaders and that the claim had not been addressed and resolved.

utes of limitations—thereby drastically affecting the "stat-[illegible]" of the claim—it must be presumed that Congress would [illegible]ve notified the Tribe that its claim would have to be [illegible]led within a certain period of years or be forever lost.[21]

Absent such clear expression of contrary intent by Congress, the intent of the Tribe, the Interior Department and Congressman Hemphill to leave the 1763 Treaty claim unaffected is controlling, for Congress clearly intended to enact legislation that would implement the division of assets plan agreed to by the Tribe. Moreover, Congress knew that tribal consent was embodied in the January 3, 1959 resolution. *Hearings* at 8, insert 6. *See Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649, 656-8 (1976) ("Nothing in the legislative history shows any congressional purpose not to follow the Secretary's proposal [that honors the Tribe's request] . . .").

Petitioners argue that because Congress explicitly preserved certain Indian rights or claims in other termination acts, Pet. Br. at 43-44 and n. 127, its failure to do so here shows congressional intent to subject the claim to state law. However, petitioners' assertion is squarely inconsistent with the rule established by the Court in *Menominee Tribe v. United States,* 391 U.S. 404 (1968), where the Court held that notwithstanding the Menominee Termination Act's failure to preserve or even mention treaty hunting and fishing rights, that Act's explicit provision that "the laws of the several States shall apply to the Tribe and its members in the same manner as they apply to other citizens . . .," 25 U.S.C. § 899, would not operate to extinguish the federally-protected right to hunt and fish free of state law. Congress' failure to expressly preserve the tribal claim in this case is fully consistent with its express and limited plan to distribute the 3,434 acres acquired

[21]In *Oneida II,* this Court noted the strong congressional policy against the application of state statutes of limitations to Indian land claims. If Congress had intended to change this policy with respect to the Catawba's Treaty claim, it would have surely given notice and provided that the claim would be deemed to have accrued on the effective date of the 1959 Act, as it did in 1966 when it enacted 28 U.S.C. § 2415.

pursuant to the 1943 Memorandum of Understanding.[22] Consistent with the guarantees made to the Tribe and the conditions upon which tribal consent to the legislation had been obtained, Congress simply was not addressing the much larger 144,000-acre 1763 Treaty claim.

C. Federal Protection Of The 1763 Treaty Lands Was Not Extinguished By The 1959 Act.

1. The Federal Protections At Issue Here Are Unrelated To The Duties Undertaken By The United States In 1943 And Hence Were Unaffected By The 1959 Act.

The legislative history of the 1959 Act demonstrates that the federal duties and responsibilities that were ended in 1959 were founded in a 1940 Congressional appropriation of $7,500 to enable the BIA "to cooperate with the State of South Carolina in the rehabilitation of the Catawba Indians". *Hearings,* Insert 5 at 3 & 4 *quoting* Oct. 31, 1940 memorandum from Commissioner of Indian Affairs to Secretary of Interior.[23] In fact, Congress had twice refused, in 1937 and 1939, to enact legislation that would have extended general federal supervision to the Catawbas (R. Vol. VI, Exs. 32, 39); *see* note 9, *supra.* Associate Commissioner Lee testified at the hearings on the 1959 Act that the BIA "gave no service at all until 1943. We had no relationship with these Indians whatsoever of any kind. It was only in 1943 that we entered into this cooperative agreement with the State of South Carolina to give some supplementary services to this group." *Hearings* at 88.

[22]When Congress intended to preserve a tribal property right, but subject that right to the operation of state law after a period of years, it specifically so provided. Section 14 of the Klamath Termination Act, 25 U.S.C. § 564m, provides that the Tribe's water rights shall not be abrogated by the Act and that Oregon law "with respect to abandonment and nonuse shall not apply to the tribe and its members until fifteen years after the date of the proclamation . . . ."

[23]The Oct. 31, 1940 memorandum further stated: "[t]here is no question of assuming federal guardianship jurisdiction, but merely of carrying out the apparent desire of Congress to give a small degree of aid to the state coupled with expert advice." *Hearings,* Insert 5 at 4.

The Committee Reports on the 1959 Act speak exclusively of a relationship and duties that "date back only to the 1940's" and which were undertaken for the limited purpose of "improv[ing] the economic conditions of the members." H.R. Rep. 910, *supra* at 2672 (J.A. 120-121). The departmental report likewise identifies the duties and assets that are the subject of the Act as those acquired pursuant to the Memorandum of Understanding. The limited nature and scope of the particular trust relationship that is the object of the 1959 Act is confirmed by the following departmental disclaimer:

> The agreement did not specify that the Federal Government was assuming guardianship of these Indians, and neither the Indians nor the State ever claimed that the Catawbas were wards of the federal government.

Id. at 2673 (J.A. 123). In fact, it is noteworthy that the other stated objective of the Memorandum, in addition to rehabilitation of the Tribe, was that the "Catawba Indians be accorded equal treatment with other citizens, without discrimination." (J.A. 45). In 1962, the "Notice" that the Interior Department had complied with the 1959 Act, provided by the Secretary to the Tribe and the South Carolina Governor, spoke exclusively in terms of withdrawing from the 1943 Memorandum of Understanding (J.A. 141).

The limited scope of duties undertaken by the United States in 1943 is further illustrated by the fact that the Department of the Interior deliberately left the Tribe's land claim outside the scope of the duties undertaken in 1943, refusing to agree to a clause in the Memorandum of Understanding that would have purported to extinguish the claim. Mem. Sol. Int., Jan. 13, 1942, I *Interior Opinions* at 1081-82 (J.A. 43-44). Instead, the Department maintained the *status quo* and advised the State that "the State itself could most properly take the initiative in negotiating with the Catawba Business Committee on the matter of the Tribal claim." Aug. 28, 1941, Assistant Commissioner of Indian Affairs to South Carolina State Auditor (R. Vol. VI. Ex. 47).[24]

The legislative history and surrounding circumstances demonstrate that the federal duties and responsibilities that were extinguished in 1959 were only those undertaken in 1943 to provide relief for the Catawbas. In contrast, the federal protections at issue here are unrelated to and pre-date the 1940 appropriations act by more than 100 years. The federal protections at issue here are founded in the 1760 and 1763 Treaties with the Crown, the Constitution, federal common law, and the Indian Nonintercourse Act, 25 U.S.C. § 177.

Lower courts that have considered the continuing applicability of Nonintercourse Act protections have concluded that, in order to maintain such a claim, a tribe must demonstrate that "the trust relationship between the United States and the tribe, *which is established by coverage of the Act,* has never been terminated." *Narragansett Tribe v. So. R.I. Land Devel.,* 418 F.Supp. 798, 803 (D.R.I. 1976) (emphasis added). In *Joint Tribal Council of the Passamaquoddy Tribe v. Morton,* 528 F.2d 370, 379 (1st Cir. 1975), the First Circuit Court of Appeals held that

[24]The Interior Department's interpretation of the scope of authority granted by Congress is entitled to weight. Udall v. Tallman, *supra.* In his August 28 letter, the Assistant Commissioner of Indian Affairs explained to the State Auditor the limited nature of the "responsibilities this Office can assume":

> As you will recall, after the State Legislature made its original offer a few years ago to contribute $100,000 toward a rehabilitation program for the Catawba Indians, a bill was introduced into Congress to bring the Catawbas under Federal supervision. This bill, however, was disapproved by the Bureau of the Budget, and in lieu thereof Congress authorized a small appropriation of $7,500 to enable us to cooperate with the State and with other Federal agencies to work out a program. This appropriation is limited to relief and to administrative expenses in connection with the cooperative project.

See Mem. Sol. Int., Jan. 13, 1942 (J.A. 41), discussed *supra* at n. 10, where the Solicitor held that the source of the Department's authority to enter into the 1943 Memorandum was the FY'41 appropriations act, but that the authority was limited to the purposes of the appropriation, *i.e.,* "relief" of the Catawbas.

federal protection under the Nonintercourse Act may exist even in the absence of any formal or recognized relationship between a Tribe and the United States:

> the 'trust relationship' we affirm has as its source the Nonintercourse Act, meaning that the trust relationship pertains to land transactions which are or may be covered by the Act, and is rooted in rights and duties encompassed or created by the Act. Congress or the executive may at a later time recognize the Tribe for other purposes within their powers, creating a broader set of federal responsibilities . . .

In this case, the federal protection pertaining to the 1840 land transaction was intentionally left outside the scope of limited duties undertaken in 1943. In 1959, although Congress certainly could have terminated federal protection of the 1763 Treaty claim, it did not do so. Instead, in furtherance of the current policy of requiring informed tribal consent, it enacted limited legislation, tribal support of which had been expressly conditioned upon leaving the "status" of the Tribe's Treaty claims unaffected. Because it cannot be argued that extinguishment of federal protection under the Treaties, Constitution, and federal statutory and common law would not affect the "status" of the claim, petitioner's broad interpretation of the effects of § 5 of the 1959 Act is precluded.

The net effect of the 1959 Act was simply to return the Catawba Tribe to its pre-1943 status—a "state" Tribe on a state reservation, ineligible for federal Indian services and subject to state law for most purposes; but not with regard to its claim to its federally-protected Treaty lands.

2. Even If The 1959 Act Removed Statutory Rights, It Did Not Remove Federal Protection Under Treaties And The Constitution.

Petitioners argue that the only source of protection for the 1763 Treaty lands is the Nonintercourse Act, claiming that the Tribe acquired pursuant to its treaties "no right to own property or to enforce claims under different laws than non-Indians." Petitioners argue that *Menominee*

is therefore inapplicable here because no treaty right is involved in this case. Pet. Br. at 43 and n. 125.

However, the issue here, as it was in *Menominee,* is whether § 5's language subjected federally-protected treaty rights to the operation of state law. Here, as in *Menominee,* the property right finds its source in a treaty with the national sovereign. The Catawba Tribe, like the Menominees, bargained for and received the protection of the sovereign for its reservation land base. While the Menominee treaty did not specifically include the right to hunt and fish, the Court applied the canon of construction requiring ambiguous expressions to be construed as the Indians would have understood them, and held that the Treaty language confirming their reservation "for a home, to be held as Indian lands are held" included the right to hunt and fish. *Menominee* at 405-406. That canon is fully applicable here.

Application of state law to the Catawba Treaty land would as surely extinguish treaty rights as would the application of state law to the Menominees' treaty rights. What the British offered and what the Catawbas thought they had received in exchange for cession of most of their ancestral lands, was sovereign protection of the Tribe's right to unmolested occupancy of its retained lands. The minutes of the 1763 Treaty negotiations ("our King and Father holds out his arms to . . . protect you . . . and you may be assured of his confirming to you all your just claims to your lands")[25]; the terms of the Treaty itself (Crown's agents "promise . . . that the Catawbas shall not in any respect be molested . . .")[26]; and the subsequent protective actions of the crown (South Carolina cannot lease Catawba lands "without a Manifest violation of His Majesty's Orders . . .")[27]; demonstrate beyond doubt that one of the most important guarantees for which the Catawba Tribe bargained in 1760 and 1763 was the promise of sov-

[25]Colonial Records of North Carolina, Vol. 2, 198 (1890) (J.A. 30).

[26]*Id.* at 201-202 (J.A. 35).

[27]Great Britain, Public Records, Colonial Office, Class 5, Vol. 74, pp. 85-87 (R. Vol. VI. Ex. 7); see n. 3, *supra.*

ereign protection.[28] The United States succeeded to the Crown's protective obligations under the 1763 Treaty.[29] The application of state law would thus result in abrogation of an express treaty right, *i.e.*, the complete extinguishment of sovereign protection of the Catawbas' lands. This in turn would have the direct result of confirming non-Indians in the possession of tribal lands—the very evil from which the sovereign had promised to protect the Tribe in the first instance.

The guarantees of the 1760 and 1763 treaties, that the Catawbas would be quietly settled on their lands free from white incursion, provide an independent source of continuing federal protection for the 1763 Treaty lands that is separate and distinct from the Nonintercourse Act. *See Oneida I, supra* at 667. In addition, they provide an independent basis for invalidating state action inconsistent with the supreme law of the land. *Washington v. Fishing Vessel Assoc.*, 443 U.S. 658 (1979); *Menominee Tribe, supra; Missouri v. Holland*, 252 U.S. 416 (1920).

Furthermore, the restraint on alienation is a necessary incident of Indian title. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 576, 591, 603 (1823). The exclusive authority of the United States to extinguish Indian title is founded in the Constitution itself. U.S. Const., art. I, § 8, cl. 3. First under Great Britain, and later the United States, Indian tribes have always been disabled from alienating their lands absent the consent of the general government. This fundamental principle antedates the statutory restraints found in the Nonintercourse Act. Thus, the

[28]The Catawba Tribe did not acquire its lands in the 1760 and 1763 Treaties; it already had them. What the Tribe acquired was sovereign protection: it *reserved* the 15-mile-square tract and relinquished its claims to a vastly larger portion of its aboriginal territory. Thus, with regard to the Treaty lands, "the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." United States v. Winans, 198 U.S. 371, 381 (1905). In return for its cession of lands, the Tribe received promises of protection by the Crown on those lands which it reserved.

[29]United States v. Title Ins. & Trust Co., 265 U.S. 472, 484 (1924); Mitchel v. United States, 35 U.S. (9. Pet.) 711, 745, 747-48 (1835).

Constitution also provides an independent basis for invalidating the 1840 state treaty and protecting the Tribe's Treaty lands. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-68, 670 (1974) (fact that fee title to Indian lands in original 13 states lay in the states "did not alter the doctrine that federal *law, treaties* and *statutes* protected Indian occupancy") (emphasis added); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 604 (1823) (invalidating pre-Nonintercourse Act land grants by tribe without consent of general government);[30] *see* F. Cohen, *Handbook of Federal Indian Law* 270, n. 2 (1982 ed.).

Thus, the central question in this case, as in *Menominee*, is whether treaty property rights may lose their federally-protected status solely by operation of a general section intended only to lift active federal supervision. Thus, even if the language of § 5 is sufficient to lift federal statutory protections, § 5 may not operate to extinguish the protections found in the 1760 and 1763 Treaties and the Constitution. Use of the word "statutes" in § 5 of the 1959 Act "is potent evidence that no *treaty* was in mind." *Menominee, supra* at 412 (emphasis in original).

D. State Law May Not Be Applied To Determine Rights In Undistributed Tribal Property.

The overall scheme of the Catawba Division of Assets Act, as well as every other act of Congress terminating federal supervision over tribal land, provides for the termination of federal protection and trust duties only for those tribal assets that are included within the scope of the act, *i.e.*, those assets from which federal restrictions are removed and which are distributed under the Act. We are aware of no instance in the history of federal Indian legislation, and petitioners have pointed to none, where Congress, in dealing with tribal trust property, has removed federal protections and applied state law without specifying the affected property and giving precise and careful instructions directing the Secretary of the In-

[30]See Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832); United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 345-46 (1941).

terior in the method and manner of division and distribution of the property. *See, e.g.*, 25 U.S.C. § 564d, e, & p.

This Court has long relied on the strong congressional policy against the application of state law to determine tribal rights in restricted property,[31] and has applied without exception the rule that state law defenses may not be invoked to overrule federal law and defeat a claim of *tribal* title.

Each of the cases upon which petitioners rely for the proposition that all federal protection was extinguished by the 1959 Act involved the question whether federal protection or trust duties continue toward former tribal property after the express removal of federal restrictions from that property and its actual distribution to individual tribal members.[32] Likewise, each of the cases cited for the proposition that state statutes of limitations apply to the 1840 taking claim after 1959 involve the application of state law to allotted individual Indian lands that were expressly the subject of the treaty or legislation at issue, *i.e.*, the lands at issue were the same lands from which federal restrictions had been removed.[33] Because these cases deal

[31]*See* County of Oneida v. Oneida Indian Nation, 105 S.Ct. 1245, 1255 and n. 13 (1985) (*Oneida II*); Board of County Commissioners v. United States, 308 U.S. 343, 350-51 (1939); United States v. Minnesota, 270 U.S. 181, 196 (1926); Ewert v. Bluejacket, 259 U.S. 129, 137-38 (1922).

[32]Affiliated Ute Citizens of Utah v. U.S., 406 U.S. 128 (1972), involved the issue of continuing federal supervision over individual Indian property (stock shares) that had been distributed pursuant to the Ute Termination Act, 25 U.S.C. § 677. The property at issue was not tribal, and federal restrictions had been removed. *Id.*, 406 U.S. at 150. Significantly, the *Affiliated Ute* Court observed, at 139, that § 677v "of course did not purport to terminate the trust status of the undivided assets", (*citing Menominee*). Taylor v. Hearne, 637 F.2d 689 (9th Cir.), *cert. denied*, 454 U.S. 851 (1981), likewise involved the distributed property of an individual Indian. United States v. Heath, 509 F.2d 16 (9th Cir. 1974), involved no property; rather, it dealt with the post-termination status of an individual Indian for purposes of criminal prosecution.

[33]See Schrimpscher v. Stockton, 183 U.S. 290 (1902); Dickson v. Luck Land Co., 242 U.S. 371 (1917); Dillon v. Antler Land

(Continued on next page)

only with the allotted lands of individual Indians, they have no relevance to a determination of rights in undistributed tribal property.[34]

Congress neither removed federal restrictions from the 1763 Treaty lands nor provided for their distribution. They thus retain their status as federally-protected tribal lands to which state statutes of limitations do not apply.

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Co., 507 F.2d 940 (9th Cir. 1974), *cert. denied*, 421 U.S. 992 (1975); Dennison v. Topeka Chambers Indus. Dev. Corp., 724 F.2d 869 (10th Cir. 1984). The discussion in Bryan v. Itasca County, 426 U.S. 373, 389-90 (1976), relied on by petitioners for the proposition that termination acts subject Indians to the full sweep of state law (Pet. Br. at 20), states no more than the fundamental proposition that a termination act subjects individual "tribal members" and their "distributed property" to state law. In this case, as in *Schrimpscher* and *Dillon*, both the Catawba Tribe and its members became subject to state law with respect to the "distributed property," i.e., the 1943 Reservation from which federal restrictions were removed. Likewise, the federal responsibility to hold title and provide services to those distributed lands was ended. But for the 140,000 acres of undistributed tribal Treaty lands that remained wholly outside the scope of the 1959 Act, federal restrictions continued unaffected.

[34]Lands that have been allotted to individuals are destined eventually to become unrestricted private property, and they take on some of the characteristics of state law prior to the final lifting of federal restrictions. Thus, the right of possession of a restricted allotment (absent an allegation of jurisdiction under 25 U.S.C. § 345), is a matter for state courts. Taylor v. Anderson, 234 U.S. 74 (1914). In 1834, Congress removed the lands of individual Indians from Nonintercourse Act coverage. Jones v. Meehan, 175 U.S. 1 at 12-13 (1899). The question of *tribal* occupancy, on the other hand, is exclusively federal in nature. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-670 (1974) (*Oneida I*): The court in *Oneida I* explained this important distinction:

> In Taylor [v. Anderson], the plaintiffs were individual Indians, not an Indian Tribe; and the suit concerned lands allocated to individual Indians, not tribal rights to lands . . . . Individual patents had been issued with only the right to alienation being restricted for a period of time . . . Once patent issues, the incidents of ownership are, for the most part, matters of local property law. . . ." *Id.* at 676 (citations omitted).

E. The Tribe's Treaty Claim May Not Be Extinguished Or Limited Absent A Plain And Unambiguous Statement Of Congressional Intent And Ambiguities Must Be Resolved In The Tribe's Favor.

1. The 1959 Act Is Ambiguous: It Does Not Clearly Apply State Law To The Tribe; Rather, In Light Of The Legislative History And Surrounding Circumstances, It Applies State Law To Only Individual Tribal Members.

In addition to dismissing as irrelevant the Act's legislative history and surrounding circumstances, petitioners' reliance on the isolated wording of § 5 is inappropriate because that section, standing alone, is ambiguous. A careful reading of § 5 reveals that it is unclear whether, upon the Act's effective date, (1) state law shall thereafter apply to both the Tribe and its members or simply to the individual members of the Tribe, and (2) whether statutes of the United States that affect Indians because of their status as Indians were rendered inapplicable to both the Tribe and its members or only to the individual members of the Tribe. Because the right at issue here is a tribal right, and assuming *arguendo* that § 5 could apply to lands from which federal restrictions were not expressly removed, the distinction that Congress drew between Indians as individuals and Indian tribes is an important one.

This point can best be understood by reference to the last sentence in § 5, providing that "[n]othing in this subchapter, however, shall affect the status of *such persons* as citizens of the United States." (Emphasis added). This sentence plainly refers to individuals, its purpose being to preserve the citizenship status of individual Indians. *See* 8 U.S.C. § 1401(b). While this is a standard provision that was contained in each termination act, the other termination acts accomplish the same purpose using slightly different language—and that difference is significant here. Each of the other termination acts, with the exception of one, provides that the citizenship status of the "members of the tribe" shall be unaffected. *See* 25 U.S.C. §§ 564q(b); 703(b); 727; 757(b); 803(b); 823(b); 848(b); 899. In contrast, § 5 of the 1959 Act provides that the citizenship status of "such persons" shall be unaffected. The words "such persons" must necessarily have reference to individual Indians in an earlier sentence. The final clause of the previous sentence in § 5 provides that "the laws of the several states shall apply to *them* in the same manner as they apply to other persons or citizens within their jurisdiction."

The conclusion that "them" refers to individual Indians and that Congress thus applied state law only to individual Catawba Indians is strengthened by a comparison of the similar provisions of other termination acts. In each of the other termination acts that affected both tribes and individuals,[35] Congress explicitly provided that state law would thereafter apply to both the "tribe and its members." *See* 25 U.S.C. §§ 564q(a); 703(a); 726; 757(a); 803(a); 823(a); 848(a); 899. In contrast, the application of state law to "them" in the 1959 Catawba Act is identical to the state law provision in its immediate predecessor, the 1958 California Rancheria Act, 72 Stat. 619, § 10(b). There, § 10(b) in its entirety dealt only with the removal of federal supervision over individual Indians. *See* n. 35, *supra*.

Moreover, the clause in § 5 rendering inapplicable statutes that affect Indians because of their status as Indians is also identical to that contained in § 10(b) of the California Rancheria Act, which affected only individuals. In fact, in eight termination acts, Congress provided that such statutes would be inapplicable only "to the members of the tribe." 25 U.S.C. §§ 564q(a); 677v; 703(a); 757(a); 803(a); 823(a); 848(a); 899. In two termination acts, Congress provided that statutes that affect Indians because of their Indian status would be inapplicable both to the tribes and the individual members. 25 U.S.C. §§ 726, 980.

[35]Two termination acts were directed primarily at individual Indians, not Indian tribes. The Mixed-Blood Ute Termination Act, 25 U.S.C. § 677, terminated certain tribal members but left the status of the Ute Tribe and its full-blood members unaffected. The California Rancheria Act, 72 Stat. 619, likewise did not deal with tribal assets. *See* § 10(b) and S. Rep. No. 1874, 85th Cong., 2d Sess. 3 (1958) (Membership rolls not prepared because "groups are not well-defined," and "lands were for the most part acquired . . . by the United States for Indians in California, generally, rather than for a specific group . . ." and assets distributed according to plans developed or approved by "administratively selected users of the land.").

Thus, Congress plainly distinguished between tribes and individuals when it terminated federal supervision. Section 5 of the 1959 Catawba Act is patterned most closely after § 10(b) of the 1958 California Rancheria Act, which by its terms affected individuals only. In 1959, when Congress sought to broaden the scope of the provision to include the Catawba Tribe among those no longer entitled to special Indian services, it expressly so provided in the first clause, but it left the scope of coverage of the remaining clauses unchanged, using the exact wording from the California Rancheria Act.

In 1962, when Congress intended to further broaden the scope of the section and ensure that the Ponca Tribe, as well as its members, would be among those to whom Indian statutes would no longer be applicable and to whom state law would apply, it specifically inserted the words "or Indian Tribe" after the word "Indians." 25 U.S.C. § 980. *See Bryan v. Itasca County*, 426 U.S. 373, 386 (1976) ("we previously have construed the effect of legislation affecting reservation Indians in light of 'intervening' legislative enactments. *Moe v. Salish and Kootenai Tribes*, 425 U.S., at 472-475 . . .").

Finally, because the 1962 Ponca Act had rendered state law applicable to both the Tribe and its members, it was necessary in the next and final sentence of that Act to preserve the citizenship status of "any Indian," rather than "such persons," as had been done in the California and Catawba Acts.

Thus, petitioners' argument that § 5 is clear depends not only upon reading § 5 without reference to those sections of the act that define the lands from which restrictions are to be removed, *see* Section I.A., *supra*, but also depends upon reading § 5 as though the final sentence regarding citizenship status were contained elsewhere in the Act or did not exist at all.

The Court of Appeals was correct in considering the overall purpose of the Act as demonstrated by its legislative history and surrounding circumstances and refusing to impute to Congress an intent to apply state law to the *tribal* Treaty claim. The Court of Appeals noted that

Congress withdrew the Nonintercourse Act's protection of individual Indians' lands in 1834, *Jones v. Meehan*, 175 U.S. 1, 12-13 (1899), and correctly held that, in terms of the type of lands under its protection, the Nonintercourse Act was a statute that affected tribes rather than individual Indians (Pet. App. 20a-21a).

The conclusion that the Nonintercourse Act is not a statute that "affect[s] Indians because of their status as Indians"—as Congress used that phrase in the Catawba Act—is strengthened by the fact that in eight termination acts Congress made such statutes inapplicable to only "members of the tribe." 25 U.S.C. §§ 564q(a); 677v; 703(a); 757(a); 803(a); 823(a); 848(a); 899. This Court has held in *Menominee Tribe, supra*, that language similar to § 5's is limited to withdrawal of federal supervision. The type of federal supervision Congress had in mind, as demonstrated by the eight acts cited above, was eligibility for services, active guardianship supervision of individual Indians' affairs, and active management of tribal real property. The protections and restrictions of the Nonintercourse Act however, do not fall within the class of federal supervisory matters intended by Congress to be addressed by § 5. Congress addressed the policies and purposes of the Nonintercourse Act in other sections of the 1959 Act.

Thus, protection of the Indians' rights in their lands that were subject to the 1959 Act was accomplished by § 3 of the Act, providing for appraisal and equal distribution of assets held in trust. Protection of the governmental interest of the United States in maintaining exclusive control over tribal land transfers was accomplished by § 4's specific lifting of federal restrictions. Thus, as Congress used the phrase in § 5 of the 1959 Act, the Nonintercourse Act was not a statute that affected Indians because of their status as Indians.

2. The Canons Of Construction Applicable To Indian Laws Preclude Indirect Extinguishment Of Treaty Rights And Require That Ambiguities Be Resolved In The Tribe's Favor.

The Court of Appeals was likewise correct in applying the canons of construction to the 1959 Act. This Court

has consistently reaffirmed the cardinal principle that "congressional intent to extinguish Indian title must be 'plain and unambiguous.'" *Oneida II, supra,* 105 S.Ct. at 1258, *quoting United States v. Santa Fe Pacific R. Co.,* 314 U.S. 339, 346 (1941). Doubtful or ambiguous expressions in statutes ratifying agreements with the Indians are not to be construed to their prejudice; rather, they are to be resolved liberally in the Indians' favor, as they would have understood. *Antoine v. Washington,* 420 U.S. 194, 199-200 (1975). In *Menominee Tribe v. United States,* 391 U.S. 404 (1968), the Court, faced with a similar situation, refused to find an abrogation of federally-protected treaty rights through the indirect method of a termination act's general lifting of federal supervision.

The general assimilationist policy pronouncements that attended the enactment of all termination legislation have never been relied on by this Court to justify an indirect, backhanded extinguishment of Indian treaty rights. *Menominee Tribe, supra; see Bryan v. Itasca County,* 426 U.S. 373 (1976). As the Court noted in *Bryan,* "courts 'are not obliged in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected . . .'" *Id.* at 388, n. 14.[36]

These principles are fully applicable here. The 1959 Act does not mention the 1763 Treaty claim. With provisions much less clear than even the Menominee Act regarding applicability of state law, the 1959 Catawba Act removes federal restrictions from only a 3,434-acre tract of federally-held trust land, leaving the 1763 Treaty lands,

[36]This is particularly so where, as here, the Act is somewhat removed both in time and federal policy from the fervent assimilationist policy announced in House Concurrent Resolution No. 108. As we have noted, the 1959 Act was passed near the end of the termination era, at a time when federal termination policy had been modified to require informed tribal consent. Moreover, the Catawbas were never "wards of the Federal Government," H.R. Rep. No. 910, *supra* at 2673 (J.A. 123), in the same sense as were the tribal Indians subject to a full-fledged federal trusteeship at whom the termination policy was primarily directed. Indeed, the title of the 1959 Act is the Catawba Division of Assets Act and neither the word "terminate" nor any of its variants appears in the Catawba Act, as it does in each of the other termination acts.

like the Menominee Treaty rights, wholly outside the purview of the Act. Removal of federal protection and extinguishment of the Catawbas' Treaty claim can come about only through the same "backhanded" method that this Court refused to sanction in *Menominee Tribe, i.e.,* a general lifting of federal supervision resulting in the extinguishment of specific treaty property rights. Moreover, the glaring ambiguities on the face of the Act would have to be resolved against the Tribe. Finally, and most significantly, the assurances upon which the United States secured the Tribe's consent would be rendered meaningless.

II. THE 1959 ACT DID NOT EXTINGUISH THE TRIBE'S STATUS AS A TRIBE.

Petitioners argue in the alternative that § 5 of the 1959 Act extinguished tribal political existence which precludes the Tribe's ability to maintain this action. As we understand this argument, it concedes that a claim survived the 1959 Act but contends that no entity capable of enforcing it survived. In any event, it is certain that Congress specifically contemplated the ongoing political existence of the Tribe, intending only to extinguish the 16-year federal obligation to participate in the joint rehabilitation effort under the Memorandum of Understanding. The 1959 Act on its face provides for the continued existence of the 630-acre state Reservation, provides for some 1943 Reservation lands to be set aside for tribal purposes and refers to the "tribe" prospectively, providing in § 5 that the "tribe" and its members "shall" henceforth be ineligible for federal Indian services and in § 6 that the rights of the "tribe" under South Carolina law "shall' be unaffected.[37]

Even where Congress acted to terminate much lengthier and more expansive trust relationships than that involved here, such action did not operate to end the exist-

[37]The Solicitor General agreed with the Court of Appeals' ruling that the Tribe has the capacity to bring this suit, but expressed no view about whether the 1959 Act precluded the Tribe as a matter of law from establishing that it is an Indian Tribe for purposes of the Trade and Intercourse Act. He concluded instead that the Tribe could maintain this suit as a successor-in-interest. U.S. Br. at 8-9, n. 8.

ence of the affected tribes: rather, what was terminated was a relationship between the tribe and the United States. *See Menominee Tribe v. United States,* 388 F.2d 998, 1000 (Ct. Cl. 1967)), *aff'd* 391 U.S. 404 (1968) (Menominee Termination Act "did not abolish the *tribe* or its membership. It merely terminated Federal supervision over and responsibility for the property and members of the Tribe.") (emphasis in original); *Kimball v. Callahan,* 590 F.2d 768, 775-6 (9th Cir.), *cert. denied,* 442 U.S. 915 (1979) (sovereign authority of Klamath Tribe to regulate tribal hunting and fishing unaffected by termination act); *see* F. Cohen, *Handbook of Federal Indian Law* 19, 815 (1982 ed.); *see also* S. Rep. No. 481, 96th Cong., 1st Sess. 13 (use of term "federal trust relationship," rather than "federal recognition," in act restoring terminated tribe "would insure that what is restored to the tribe . . . is the same as what was diminished or lost under the 1954 [termination] Act.").

Petitioners rely heavily on the 1959 Act's revocation of the Tribe's constitution in support of their argument. The committee reports on the 1959 Act, however, show that Congress understood well that the Tribe's constitution had been adopted pursuant to the Memorandum of Understanding in order that the State and the BIA would have a more structured government with which to contract for the delivery of services:

> In the memorandum of understanding the tribe agreed to organize to transact community business, and on June 30, 1944, an IRA constitution and bylaws were approved by the Secretary of the Interior.

H.R. Rep. No. 910, *supra* at 2674 (J.A. 125-126). As the Court of Appeals correctly held, § 5's revocation of the tribal constitution was part of the overall legislative scheme to withdraw the BIA from the 1943 agreement and return the State and the Tribe to their pre-1943 status.

Moreover, because tribal powers of self-government are not derivative of federal powers,[38] revocation of the

[38]Indian tribes have always been recognized as "distinct, independent, political communities," Worcester v. Georgia, 31

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Tribe's federal constitution cannot be said to extinguish the Tribe's political existence. It is axiomatic that tribal political existence is in no way dependent upon federal approval or recognition of any particular form of government.[39] Indeed, independent political existence was required by the IRA before a tribe would be permitted to organize under its provisions, *see* F. Cohen (1982 ed.), *supra* at 13-15, and the Catawba Tribe was no exception.

The Catawba tribal constitution revoked by the 1959 Act was adopted by the Tribe pursuant to § 16 of the IRA. Prior to authorizing the Catawba Tribe's IRA election, the Solicitor of the Department of the Interior ruled that the Catawbas existed politically:

> The files are full of evidence which is conclusive that a tribal organization has been continuously maintained by these Indians over a long period of time. The Indians have done business as a tribe and the relationship between the tribal organization and its members conforms to the usual tribal pattern. There can be no doubt that the Catawba Indians now exist as a tribe

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U.S. (6 Pet.) 515, 559 (1832), whose sovereign powers may be recognized, but are not created, by the federal government. Talton v. Mayes, 163 U.S. 376 (1896); United States v. Wheeler, 435 U.S. 313, 322, 328 (1978); McClanahan v. Arizona Tax Comm., 411 U.S. 164, 172-3 (1973); *see Powers of Indian Tribes,* Mem. Sol. Int., 55 I.D. 14, 19, 30 (Oct. 25, 1934).

[39]Tribal governments have always varied widely in degree of structure and organization. *See* F. Cohen, *Handbook of Federal Indian Law* 122 (1942 ed.); Montoya v. United States, 180 U.S. 261, 265 (1901). In 1934 Congress enacted the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. §§ 461-479 ("IRA") to encourage tribes to adopt a more formal structure. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151-2 (1973); *see* F. Cohen, *supra* (1982 ed.) at 18, n. 107. The Act provided that a tribe "may" adopt a constitution and bylaws, by majority vote, and also provided for revocation of a constitution upon a majority vote, 25 U.S.C. §§ 476, 478. Under the IRA, the Secretary conducted 258 elections in which 181 tribes elected to organize under the Act and 77 tribes, including the largest (Navajo), rejected it. *See* Kerr-McGee Corporation v. Navajo Tribe of Indians, 105 S.Ct. 1900, 1902; Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934,* 70 Mich. L. Rev. 955, 972 (1972); *see also* F. Cohen (1982 ed.), *supra* at 150.

and have had a known tribal existence for almost a century.

The Solicitor further ruled that the Catawbas had been a federally-recognized tribe since 1848, had continuously "retained their tribal organization ever since . . ." and were therefore entitled to vote on an IRA constitution. *Questions Of the Catawbas' Identity and Organization As A Tribe And Right To Adopt An IRA Constitution,* Mem. Sol. Int. (April 11, 1944), *reprinted in* II *Interior Opinions* at 1261 (J.A. 51-52).

It is certain that Catawba tribal political existence was not dependent upon or founded in its IRA constitution. The Tribe's recognized political existence predated its adoption of an IRA constitution by more than 200 years (R. Vol. VI, Ex. 1)—or since 1848 according to the Solicitor—and the revocation of that document cannot logically be said to extinguish an existence not in any way founded within it. The tribal constitution had been adopted to facilitate the 1943 rehabilitation program, and its revocation was simply part of the overall legislative plan to return the Tribe to its pre-1943 status. The State has continued to hold the 630-acre reservation acquired in 1842 in trust for the Tribe. Op. Atty. Gen. S.C., No. 3988 (March 6, 1975) (R. Vol. VI, Ex. 15).

III. EVEN IF STATE LAW WERE TO APPLY, THE TRIBE WOULD STILL HAVE SIGNIFICANT CLAIMS.

Because South Carolina, alone among the state jurisdictions, does not permit tacking of successive periods of possession by adverse occupants in order to establish title pursuant to its 10-year statute of limitations, S.C. Code Ann. § 15-3-340 (1976), an 18-year delay under South Carolina law would not establish even a presumption of title. Indeed, the United States concedes that application of state statutes of limitations to the Tribe's claim might not immediately resolve the underlying controversy (U.S. Br. at 17, 20).

South Carolina law is clear. As the foremost commentator on South Carolina property law has observed:

> The rule in this state, contrary to the view of the overwhelming majority of jurisdictions, is that even though there be privity by deed or devise between successive adverse occupants of land, the possession of such occupants cannot be tacked to make out title by adverse possession under the statute of limitations.

D. Means, *Survey of Property Law,* 10 S.C.L.Q. 90 (Fall 1958). Professor Means' statement is supported by an unbroken line of South Carolina Supreme Court decisions. *See Adams v. Adams,* 220 S.C. 131, 66 S.E.2d 809 (1951); *Haithcock v. Haithcock,* 123 S.C. 61, 68, 115 S.E. 727, 729 (1928) ("A man cannot tack, in order to make ten years . . . . The 10 years must be 10 years in himself alone, or by way of inheritance", *quoting with approval* trial judge's jury charge); 7 R. Powell, *The Law of Real Property,* ¶ 1014[2] at 91-63 (1984).

In *Crotwell v. Whitney,* 229 S.C. 213, 220-21, 92 S.E. 2d 473, 477 (1956), the South Carolina Supreme Court stated plainly that the adverse occupant has the burden of establishing possession for the entire 10-year statutory period without tacking:

> Plaintiffs having established their legal title to the premises, appellant['s] . . . claim of title by adverse possession required proof of actual, open, notorious, hostile, continuous and exclusive possession by him, or by one or more persons through whom he claimed, for the full statutory period of ten years, *without tacking of possession* except by descent cast. Code 1952, Sections 10-2421 [now codified as § 15-67-210], 10-124 [now codified as § 15-3-340]; . . . (citations omitted, emphasis added).

See also Gregg v. Moore, 226 S.C. 366, 371, 85 S.E.2d 279, 281 (1954) ("The burden of proof of adverse possession is on the party relying thereon . . . ."). Thus, in order to defeat the Tribe's claim of title, each defendant would be required to prove open, hostile, notorious and continuous possession for a 10-year period.[40]

[40]It is also certain that under South Carolina law, those defendants against whom the claim was not barred by the 10-year statute of limitations could not invoke the equitable defense of laches. "Laches within the period of the statute of limitations is no defense at law." Crotwell v. Whitney, *supra,* 229 S.C. at 223, 92 S.E.2d at 478.

The consistent line of South Carolina Supreme Court decisions demonstrates that South Carolina's anti-tacking rule and the 10-year statute of limitations are inextricably linked: the 10-year limitations period contained in S.C. Code Ann. § 15-3-340 (1976) may only be asserted by an adverse possessor who has been in possession for at least 10 years. *Crotwell v. Whitney, supra;* Note, *Effect of Disability of Landowner With Respect to the Acquisition of Adverse Rights by Another by Statutes of Limitations, Presumption of a Grant, and Prescriptive Right in South Carolina,* 10 S.C.L.Q. 292, 298 (Winter 1958); *see* 7 R. Powell, *supra,* ¶ 1012[2] at 91-4 ("The theory upon which adverse possession rests is that the adverse possessor may acquire title at such time as an action in ejectment by the record owner would be barred by the statute of limitations.").

Petitioners argue, however, that S.C. Code Ann §§ 15-3-340 (statute of limitations) and 15-67-210 (adverse possession) (1976) set up two different defenses to an action to recover possession: (1) that the plaintiff has not possessed the land within the past ten years, and (2) that defendant has adversely possessed the land for ten years. They assert that the anti-tacking rule applies only to the second, whereas petitioners rely upon the first. Lastly, petitioners attempt to derive significance from the fact that the two statutory sections appear in different chapters of the Code.

Petitioners' attempt to sever the relationship between these two statutory sections has no foundation in law. At the time of enactment, the predecessors of the present sections appeared as sections 101 and 104 of the same Act. *See* 14 Stats. of S.C. 444 (1870). It is apparent from the text of the two sections that § 15-67-210 refines and modifies § 15-3-340:

> § 15-3-340. First and second actions by individual for recovery of land.
>
> No action for the recovery of real property or for the recovery of the possession thereof shall be maintained unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within ten years before the commencement of such action.

> § 15-67-210. Presumption of possession; when occupation deemed under legal title.
>
> In every action for the recovery of real property or the possession thereof the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law. The occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title unless it appear that such premises have been held and possessed adversely to such legal title for ten years before the commencement of such action.

The case law since enactment of the 1870 Act has uniformly recognized the integral relation between these two provisions. Indeed, had petitioners continued their quote from *Haithcock v. Haithcock, supra,* Pet. Br. at 27, they would have found, immediately after the assertion that possessors may defeat the owner's title by showing that he has not been in possession for ten years preceding the action, the explanation that South Carolina law presumes possession in anyone who shows legal title:

> Now, what is possession of land? I charge you that, under the law, if one shows paper title—a deed or will or legal paper title of any kind, to land—then the law presumes that he was in possession of that land, and that his title gives him the possession: that is, the possession follows the title. . . .
>
> In other words, gentlemen, the law presumes, where a man shows title, he need not be on the land, he need not be in 10 miles of the land, if he shows perfect legal title, then the law says the possession follows the title, and he is deemed to be in possession if he shows a good legal title to the land, although he may never have seen the land; and that presumption holds unless, and until, some one else goes on the land and occupies and holds it adversely to that right for 10 consecutive years.
>
> So I say, the establishment of a perfect legal title to a tract of land is a presumption that the person is in possession, unless and until someone else, by the pre-

> ponderance of the testimony, shows that he has been in actual adverse possession of that land for 10 consecutive years.

Haithcock, supra, 123 S.C. at 69-70, 115 S.E. at 729-30. Similarly, in *Love v. Turner,* 71 S.C. 322, 330, 51 S.E. 101, 104 (1904), the South Carolina Supreme Court stated: "If the plaintiff had the legal title, he was presumed to be possessed of the land within the 10 years, and it was necessary to rebut this presumption by proof of continuous adverse possession of some other person for 10 years", [*citing Garrett v. Weinberg,* 48 S.C. 28, 26 S.E. 3 (1896)]. These cases make clear that there are not two, but one, statutory defense, and that adverse possession and the statute of limitations are two names for the same legal rule.

Petitioners' assertion that the Tribe "admittedly did not possess the land at any time during the ten years before they commenced this action" (Pet. Br. at 28) is therefore flatly incorrect. The Tribe's perfect title is presumed for purposes of this motion and therefore, under South Carolina law, the Tribe is presumed to be in possession under § 15-3-340 until someone else proves "actual adverse possession of that land for 10 consecutive years." *Haithcock, supra,* 123 S.C. at 70, 115 S.E. at 730.

CONCLUSION

Petitioners read far too much into the 1959 Act. It was legislation of limited scope, designed only to implement a clear understanding between the Tribe and the federal government that certain lands would be distributed; but only on the condition that this claim be unaffected. Absent a clear expression of congressional intent to abrogate, the assurances upon which tribal consent was obtained are controlling. Congress professed only to be acting consistently with tribal consent and neither the Act nor its history even suggests an intent to extinguish or modify this claim. Congress in 1959 did not intend to deprive the Tribe of its opportunity to resolve the claim it had so persistently sought to protect.

The judgment and opinion of the Court of Appeals should be affirmed.

Respectfully submitted,

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